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Will Federal Agencies Stand Alone on CERCLA Liability?

Lieutenant Colonel David Howlett

According to a recent Supreme Court case, retroactive application of a statute may be unconstitutional. This holding could affect interpretations of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[1] and create havoc for federal agencies responsible for cleanup expenses under CERCLA. In *Eastern Enterprises v. Apfel*,[2] the Supreme Court invalidated the Coal Industry Retiree Health Benefits Act of 1992 as it applied to a company that had ceased mining operations before passage of the law. Justice O'Connor wrote for four Justices that the law's retroactive application was an unconstitutional taking of property. A fifth justice found a violation of due process.

According to the opinion, legislation could be found unconstitutional "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." [3] As Justice O'Connor noted, it did not matter that the mining company could seek indemnification from other companies or through insurance. Since such reimbursement was not conferred as a matter of right, the unconstitutional taking was still effective.

It is easy to see the parallels between the Coal Industry Retiree Health Benefits Act of 1992 and CERCLA.[4] CERCLA imposes strict liability for activities involving hazardous waste that occurred long before its enactment in 1980. The liability can be both severe and
disproportionate to experience; millions of dollars in liability can arise from the disposal of small amounts of material. This liability can be completely unexpected since the methods of disposal were often completely legal and even occurred pursuant to regulatory permits. As in *Eastern Enterprises*, the liability assessed in CERCLA seems like it was "made in a vacuum." [5] Although CERCLA also offers an opportunity to seek contribution against other parties, reimbursement is not guaranteed.[6]

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[1] 42 U.S.C. § 9601, *et. seq.*
[2] __ U.S. __, 118 S. Ct. 2131 (1998).
[3] Id. at 2149.
[4] *See,* Alfred R. Light, *"Taking" CERCLA Seriously: The Constitution Really Does Limit Retroactive Liability,* 13 Toxics L. Rep. 238 (1998).
[5] 118 S. Ct. at 2150 (referring to the calculation made under the Coal Industry Retiree Health Benefits Act of 1992).
[6] 42 U.S.C. § 9613(f).

CERCLA is mentioned only by the dissent in *Eastern Enterprises*. Citing CERCLA, the dissenting opinion stated "Congress has sometimes imposed liability, even 'retroactive' liability, designed to prevent degradation of a natural resource, upon those who have used and benefited from it." [7] The dissent compared the Benefits Act under review to CERCLA, apparently viewing the latter as a law in which retroactivity was proper. The plurality opinion and the concurring opinions do not mention CERCLA. This could be taken as an ominous sign that these justices might find some applications of CERCLA unconstitutional and were therefore not rising to the statute's defense. As a recent commentator puts it, "The conservatives' silence in this respect is deafening." [8]

In two other recent cases,[9] parties found liable for pre-1980 disposal practices have asked courts to find retroactive application of CERCLA unconstitutional, relying on *Eastern Enterprises*. If successful, this approach would be widely repeated and would eliminate CERCLA liability for many potentially responsible parties.

This development has important implications for the federal government. Although federal agencies are treated as any other nongovernmental entity under CERCLA,[10] the government does not have Fifth Amendment taking or substantive due process rights. Federal agencies would therefore be unable to take advantage of the *Eastern Enterprise* retroactivity defense to CERCLA liability.

At a long-closed site, federal agencies could be the only responsible parties remaining once others escape retroactive liability. This could lead to interesting results. Because the Environmental Protection Agency (EPA) cannot sue the United States under the unitary executive theory, there is no possibility of a court judgment against the federal agency. Therefore, the Judgment Fund would not be available to satisfy the agencies' CERCLA liability.[11] The EPA, which could still proceed administratively, would likely demand that agencies use installation restoration funds to make payment. If the agencies did so, their ability to clean up their facilities would be disrupted.

For these reasons, we should watch closely if private parties use *Eastern Enterprises* to invalidate retroactive application of CERCLA. (LTC Howlett/LIT)

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[7] 118 S.Ct. at 2164-65 (Breyer, J. dissenting).

[8] Light, *supra,* note 4 at 242.

[9] *See*, *Asarco Seeks Dismissal of $1 Billion Suit Relying on Eastern Enterprises Decision,* 13 Toxics L. Rep. 586 (1998) and *Aluminum Firm Calls on District Court to Dismiss Liability Based on Recent Ruling*, 13 Toxics L. Rep. 587 (1998).

[10] 42 U.S.C. §§ 9620, 9659.

[11] 31 U.S.C. §1304. This statute authorizes funds to pay "final judgments, awards, compromise settlements, and interests and costs specified in the judgments..." 31 U.S.C. §1304(a). The statute does not now apply to settlement of administrative actions brought by the U.S. Environmental Protection Agencies or other regulatory agencies. The only administrative settlements authorized for payment are Federal Tort Claims Act awards and awards by Boards of Contract Appeals. *See,* United States Treasury Financial Manual, Part 6, Chapter 3100, §3130.40.

Clean Air Act Enforcement Alerts

Lieutenant Colonel Richard Jaynes

This note provides the latest on the doctrine of sovereign immunity as it relates to the Clean Air Act (CAA).[12] It is also an update on the Environmental Protection Agency's (EPA) efforts to implement its authority to impose punitive fines on other Federal agencies.

No Waiver of Sovereign Immunity – A Correction: The Army's Central Regional Environmental Office (CREO) recently published an article in its quarterly newsletter[13] erroneously stating that the Army had "waived" sovereign immunity in settling a CAA dispute with state regulators in Arkansas. The CREO based its article on a news item in the *Defense Environment Alert*.[14] The *Alert* article had presented a State of Arkansas spokeswoman's perspective of a consent order reached with Pine Bluff Arsenal (PBA). She believed that the Consent Order was equivalent to a waiver. The Army does not agree. Rather, the PBA settlement represents an agreement to disagree on the sovereign immunity issue and does not obligate PBA to pay punitive fines. Unfortunately, the CREO's effort to inform readers about the PBA matter resulted in the incorrect statement that the Army had changed its policy regarding the payment of punitive CAA fines. While the CREO will print a retraction of the article in its next issue, this error is being pointed out here to avert confusion that the CREO article may cause in the interim.

No Waiver of Sovereign Immunity – the Latest: The Air Force recently scored a significant CAA victory in a case decided by the U.S. District Court for the Eastern District of California.[15] In *Sacramento Metropolitan Air Quality Management District v. United States,* the Sacramento District sought to enforce a punitive fine of $13,050 against McClellan Air Force Base for violations of the base's permitted natural gas usage limits. In granting the Air Force's motion for summary judgment, the court closely followed Supreme Court precedent,[16] finding that the CAA does not waive sovereign immunity for punitive fines. Hopefully, the *Sacramento* case signals a positive Federal court trend toward resolving what has been a somewhat contentious issue for years.

No Waiver of Sovereign Immunity – Legal Terms: The CAA's Federal facilities provision[17] contains a limited waiver of sovereign immunity with respect to state, interstate, and local air pollution control laws. It requires Federal agencies to comply with air pollution control programs "to the same extent as any nongovernmental entity."[18] It also subjects
Federal agencies to payment of administrative fees and "process and sanctions" of air

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[12] 44 U.S.C.A. §§ 7401-7671q (West 1998).
[13] *Army Waives Sovereign Immunity in CAA Issue in Arkansas*, Environmental Monitor, (Army Central Regional Environmental Office, Kansas City, MO), Fall 1998, at 5.
[14] *Army, Arkansas Sidestep CAA Sovereign Immunity Issues with Consent Agreement,* Defense Environmental Alert, Vol. 6, No. 17, Aug. 26, 1998 (*see* http://denix.cecer.army.mil/denix/DOD/News/Pubs/DEA/26Aug98/05. doc.html).
[15] *Sacramento Metropolitan Air Quality Management District v. United States*, CIV S-98-437 (E.D. Cal. Nov. 13, 1998).
[16] *U.S. Department of Energy v. Ohio*, 503 U.S. 607 (1992).
[17] 42 U.S.C.A. § 7418(a) (West 1998).
[18] *Id.*

program regulatory entities.[19] The precise meaning of the terms "process and sanctions" has been the subject of litigation in the Federal courts for several years. The United States Supreme Court interpreted these terms when it examined the Federal facilities provision of the Clean Water Act (CWA)[20] in *U.S. Department of Energy (DoE) v. Ohio*.[21] The Court found that this aspect of the CWA's sovereign immunity waiver, which is virtually identical to the CAA's waiver, did not subject Federal facilities to "punitive fines" imposed as a penalty for past violations. This was based on a finding that the CWA did not contain a clear and unequivocal waiver of sovereign immunity. In contrast, the Court found that the CWA waived sovereign immunity for court-ordered "coercive fines" imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively.

The Supreme Court's decision in *DoE v. Ohio* was formally extended to the CAA in a Georgia Federal District Court case, *U.S. v. Georgia Department of Natural Resources.*[22] The *Georgia* case held the CAA does not authorize Federal agencies to pay punitive fines. A contrary result, however, was reached in another Federal case, *U.S. v. Tennessee Air Pollution Control Board,* where a District Court deviated from the analytical approach of the U.S. Supreme Court.[23] The *Tennessee* case is currently pending appeal in the 6th Circuit, where the United States recently presented its position in writing and oral argument. The U.S. maintained that the CAA's partial waiver of sovereign immunity does not authorize Federal agencies to pay punitive fines. In making its argument, the U.S. relied on *Sacramento Metropolitan Air Quality Management District v. United States* -- the second case to find that the CAA did not contain a waiver of immunity. (This was the McClellan A.F.B. case discussed above).

Sovereign Immunity – EPA View: In contrast to the U.S. position on sovereign immunity, last year, the Department of Justice opined[24] that EPA has authority under the CAA to impose punitive fines against Federal agencies. Since then, EPA has been pursuing
regulatory changes[25] that will formally extend existing administrative hearing procedures to

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[19] *Id.*
[20] 33 U.S.C.A. §§ 1251-1387 (West 1998).
[21] 503 U.S. 607 (1992).
[22] *U.S. v. Georgia Department of Natural Resources*, 897 F. Supp. 1464 (N.D. Ga. 1995).
[23] *U.S. v. Tennessee Air Pollution Control Board*, 967 F. Supp. 975 (M.D. Tenn.1997), *appeal pending*, No. 97-5715 (6th Cir.).
[24] Memorandum from Dawn E. Johnson, Acting Assistant Attorney General, Office of Legal Counsel, to Jonathan Z. Cannon, General Counsel, Environmental Protection Agency, and Judith A. Miller, General Counsel, Department of Defense, Re: Administrative Assessment of Civil Penalties Under the Clean Air Act (July 16, 1997)
[25] Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 63 Fed. Reg. 9464 (1998) (to be codified at 40 C.F.R. pt. 22 and 59) (revisions to existing rules proposed Feb. 25, 1998). EPA has also resumed its CAA field citation program rulemaking, which was interrupted when EPA asked the Department of Justice to resolve the DoD-EPA dispute over EPA's authority to assess penalties. Field Citation Program, 59 Fed. Reg. 22776 (1994) (to be codified at 40 C.F.R. pt. 59) (proposed May 3, 1994).

EPA's CAA enforcement actions. EPA recently published guidance[26] that instructs its regional counsels and air program directors to provide the same administrative procedures to Federal agencies as apply to private entities. The EPA policy discusses the hearing and settlement procedures available, as well as EPA's policies on compliance orders, criteria for penalty assessments, and its press release practice. The policy also indicates that Federal agencies will have the opportunity to consult with the EPA Administrator prior to a CAA penalty becoming final, and explains how that right may be exercised. To date, EPA has not exercised its new-found penalty authority against an Army facility, nor has it initiated an enforcement action acting as the surrogate of a state air program regulatory agency.

No Waiver of Sovereign Immunity – A Caution: It is important to emphasize that the availability of sovereign immunity as a defense against punitive fines should only serve as a shield to fine payment -- never as a sword against CAA compliance. Federal agencies are bound to comply with all laws and regulations for air pollution control. As such, they are subject to payment of administrative fees and any court-imposed coercive fines. Where deficiencies are noted in a Federal facility's air pollution control activities, the facility has the same obligation as nongovernmental entities to expeditiously correct all infractions. Such facilities are not exempted from these responsibilities because they lack the authority to pay punitive fines.

Despite the foregoing, we have observed that some state regulatory agencies insist that they cannot effectively regulate the various military Services unless they are able to impose punitive fines. This, coupled with a view that Congress waived sovereign immunity for CAA fines, can make for contentious negotiations. It is not surprising that installations that have established a poor track record with regulatory agencies can find it very difficult to resolve even minor infractions. The state may insist on the payment of a fine as a matter of principle, so it is incumbent on Army installations to diligently follow the CAA. The existence of sovereign immunity makes vigilance in CAA compliance essential to maintaining peace with the regulatory community. (LTC Jaynes/CPL)

Restoration and Natural Resources Topics of Interest

Lieutenant Colonel Allison Polchek

Withdrawal of Lead Based Paint (LBP) Guidance: On 30 Oct, the Assistant Chief of Staff for Installation Management withdrew the LBP Guidance previously issued on 26 Aug 98. The guidance was withdrawn, in response, to a request by the Principal Assistant Deputy Under Secretary of Defense (Environmental Security). The DoD request cited the on-going discussions between DoD and EPA regarding resolution of the LBP controversy as the reason for the withdrawal request, and anticipated completion of those discussions within the next sixty days.

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[26] Memorandum from Steven Herman, Assistant Administrator, to Regional Counsels and Air Program Directors, Environmental Protection Agency, Re: Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (Oct. 9, 1998) (*see* http://es.epa.gov/oeca/fedfac/policy/ caagui8.pdf).

Native American Policy: On 20 Oct 98, the DoD issued the Department of Defense American Indian and Alaska Native Policy. Most significantly, this policy establishes a requirement to consult with Native American tribes, on a government-to-government basis, regarding DoD actions that may have the potential to significantly affect protected tribal resources, tribal rights, or Indian lands. The new policy has the potential to impact many areas of installation activities, including restoration and clean-up activities and range operations. This policy can be obtained through the internet by contacting this address: http://www.denix.osd.mil/denix/Public/Native/Outreach/policy.html (LTC Polchek/RNR)

OPERATIONAL AND ENVIRONMENTAL EXECUTIVE STEERING COMMITTEE FOR MUNITIONS

Lieutenant Colonel Jill Grant

Over the last few years, both regulators and the public have expressed increased interest in the use of munitions on active ranges. This may lead to additional regulation and changes in environmental laws to include requirements for cleanup of unexploded ordnance (UXO) and other contaminants. The potential for non-Department of Defense (DoD) regulation of active ranges energized the operational community to become more involved in range management and munitions' use issues. In addition, DoD articulated the need for "sustainable range use" to protect the use of military ranges for training. Accordingly, the DoD chose an existing organization, the Ordnance Environmental Executive Steering Committee (OEESC), to look into this matter. (The OEESC was organized in the late 1980's to address environmental issues involving ordnance for DoD.) The OEESC was directed to revise its charter and reorganize its membership to include a more operational "warfighter" representation.

In September 1998, OEESC was rechartered and renamed the Operational and Environmental Executive Steering Committee for Munitions (OEESCM). Its mission is to "develop overarching DoD policies, positions, and action plans related to the lifecycle management of munitions to support readiness by balancing operational needs, explosives safety, and environmental stewardship throughout the acquisition, management, use and disposal of munitions." The primary goal is readiness support in the lifecycle management of munitions.

The OEESCM will bring a Joint Service, multi-disciplinary approach to the management of ranges and munitions. The Deputy Assistant Secretary of the Army, Environment, Safety and Occupational Health, Mr. Raymond Fatz, is a permanent co-chair. The other co-chair will serve a twelve month term and will rotate between the three other Services. Currently, Brigadier General Huly, the Director, Operations Division, Headquarters Marine Corps (Plan, Polices, and Operations) is the co-chair. In addition to the Service operators, the OEESCM membership includes representatives from the following communities of the Services and Office of the Secretary of Defense: logistics (to include ordnance); environmental; installation management; safety and explosives safety; research, development, testing and evaluation and legal.

The OEESCM will include five subcommittees, chaired by an O6 or GS/GM 15, to address issues relating to the lifecycle of munitions. These subcommittees are: (1) munitions acquisition; (2) munitions stockpile management; (3) range and munitions use; (4) munitions demilitarization; and (5) range response actions. Each Service will chair a subcommittee, with the Army chairing the Range Response Subcommittee and co-chairing, with the Air Force, the Range and Munitions Use Subcommittee (RMUS).

The subcommittee most relevant to training on our military installations is the RMUS, which has been operating for about two months. Its first order of business is drafting a DoD Instruction governing environmental and explosives safety management on DoD active and inactive ranges. The RMUS will also wrestle with such contentious issues as Emergency Planning and Community Right-To-Know Act toxic release inventory reporting for munitions fire on ranges, the status of UXO under CERCLA, UXO clearance requirements, as well as environmental monitoring, and range scrap.

Clearly, the manner in which the RMUS, the OEESCM, and ultimately DoD, choose to resolve the issues involved in range management and munitions' use could have an enormous impact on training - both in terms of availability of active ranges for training and of money for training. It is critical that our operators - those responsible for ensuring our soldiers are trained and ready - weigh in on the resolution of these issues. The OEESCM will ensure their voices are heard. (LTC Grant/CPL)